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In the

Supreme Court of the United States

October Term, 1965

No. 607

GUS POSTELL and WILLARD WHITLEY,
Petitioners,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Gus Postell and Willard Whitley, your petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled cause on June 17, 1965.

OPINION BELOW

The opinion of the Court below (Appendix A, *infra,* 1-18 is reported at 347 F.2d 207.

JURISDICTION

The judgment of the Court below, (Appendix B, *infra,* 19), was entered on June 17, 1965. A timely petition for rehearing was denied on August 30, 1965 (Appendix C, *infra,* 20). A stay of mandate was granted, and by order

of Mr. Justice Potter Stewart, the time for filing this petition for a writ of certiorari was extended to and including October 29, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

PREFACE

The questions presented in the petition for a writ of certiorari heretofore filed herein by the petitioner, Frank J. Andrews, are equally germane to the questions presented by these petitioners. These questions are full briefed in the petition and brief filed herein by petitioner, Frank J. Andrews, and these petitioners ask the indulgence of the Court for permission to adopt the questions presented, and the brief in support thereof, filed on behalf of Frank J. Andrews, as a part of their petition and brief. This, the petitioners feel, is appropriate in the interests of brevity, and for the convenience of the Court, as well as of counsel.

1. Should the Motion to Suppress Evidence, seized under the search warrant, have been sustained?
2. Was there a fatal variance between the indictment charging one conspiracy, and the evidence tending to show multiple conspiracies?
3. Were the petitioners denied a fair trial by reason of the failure of the District Court to sustain their Motion for a Severance?
4. Should the Court have sustained the Motion for a Mistrial after permitting the attorney for the United States to read to the witness, James Harris, lengthy answers alleged to have been given by Harris before a Grand Jury?
5. Did the Court err in overruling the motion of the Petitioners, Postell and Whitley, for a Judgment of Acquittal?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved are:

Fourth Amendment to the United States Constitution.
Fifth Amendment to the United States Constitution.
Sixth Amendment to the United States Constitution.
United States Code:
Title 28, Section 1254(1).
Title 47, Sections 203(c)(3), 501, 409 L.

STATEMENT

The petitioners, Gus Postell and Willard Whitley, were indicted, along with Frank Andrews, Peter A. Andrews, Jr., Louis Tye, Frank Andriola, and Russell A. Malone, by a Grand Jury for the Eastern District of Kentucky. Count 1 of the indictment charges all of the named defendants with the conspiracy to defraud the Internal Revenue Service of the Treasury Department of the United States of its governmental function in the ascertainment, computation, assessment and collection of taxes, and to wilfully attempt to evade and defeat a large part of excise taxes on wagers due and owing to the United States. The conspiracy is charged to have existed continuously from on or about January 1, 1955 to the date upon which the indictment was returned, to-wit: December 21, 1961. The petitioners, Postell and Whitley, were indicted in Counts 2 through 32, with the substantive offense of engaging in the business of accepting wagers, and conducting a lottery for profit, and wilfully attempting to evade and defeat the excise tax due and owing on wagers accepted. The counts of the indictment, 2 through 32, charge that for each month, commencing and

including August 1961, a separate offense was committed, said offenses being charged monthly in the indictment in reverse chronology to February 1959.

Count 33 charges that all defendants, except Russell A. Malone, did unlawfully, wilfully and knowingly cause the Cincinnati and Suburban Bell Telephone Company and the Citizens Telephone Company to furnish telephone facilities at 335 Central Avenue, Newport, Kentucky, which were used for an unlawful purpose, thereby causing a violation of the effective tariff filed by the American Telephone and Telegraph Company with the Federal Communications Commission, the said tariff having been concurred in by the Cincinnati and Suburban Bell Telephone Company and the Citizens Telephone Company. The sections charged to have been violated in this count are 47 U.S.C. Section 203(c)(2) and 501.

The petitioner, Gus Postell, was found guilty on Counts 1 through 15, and Count 33. He was found not guilty on Counts 16 through 32. The petitioner, Willard Whitley, was found guilty on Counts 1 through 33 (2374a).[1]

Upon this verdict, the petitioner, Gus Postell, was sentenced to 5 years imprisonment and a fine of $10,000 on Count 1, and to stand committed for the payment of the fine, on Counts 2 through 15, sentenced to 5 years imprisonment, and on Count 33, one year imprisonment, all sentences to run concurrently. (2382a).

The petitioner, Willard Whitley, was sentenced to 5 years imprisonment and a $10,000 fine on Count 1, to stand committed for payment of the fine. He was sentenced to 5 years on Counts 2 through 32, both inclusive, and to one year on Count 33, all imprisonment sentences to be served concurrently (2381a).

[1] The letter "a" refers to the Appendix filed below, copies of which have been filed with the Clerk of this Court.

ARGUMENT

1. SHOULD THE MOTION TO SUPPRESS EVIDENCE, SEIZED UNDER THE SEARCH WARRANT, HAVE BEEN SUSTAINED BY THE DISTRICT COURT?

A motion was timely made to suppress the evidence seized under the search warrant and the motion may be found at 2322a, et seq.

The validity of the search warrant was questioned, on five grounds, and the action of the District Court in overruling the motion to suppress evidence seized under the warrant was an assigned error. The opinion of this Court held that this was no error. The only facet of the question considered in the opinion is whether the warrant was directed to a proper officer. That was only one point. There remained the question, unanswered by the opinion, of whether the facts stated in the affidavit were sufficient to constitute probable cause for the issuance of the warrant. The evidence is uncontradicted, that at the time of the issuance of the warrant, there were wagering stamps issued to persons on each of the premises. This being true, it would have been impossible for anyone to say that there was a violation of the wagering tax laws until the following month, when tax returns, showing accepted wagers, were required to be filed.

We think our contention of a lack of probable cause is of significant importance in the matter and this ground was not considered by the Circuit Court of Appeals.

Under Subdivision C of Rule 41 F.R. Cr. P., providing that search warrants shall issue only on affidavits sworn to before the Judge or Commissioner, the Commissioner must look solely to the affidavit and determine if facts disclosed

thereby constitute probable cause for issuance at the time of issuance. *U.S.* v. *Nichols,* 89 F. Sup. 953.

We have stated heretofore that the Affidavit is silent as to any description or identification of a wager by the affiant. In a matter of the nature of this case, the only property subject to seizure is that "designed or intended for use or which has been used as a means of committing a criminal offense". Rule 41 (a) (2) F.R.Cr. P. It should be apparent that no records required by law to be kept, or which were in fact kept, in furtherance of the business not prohibited by federal law should be seized.

Probable cause for the issuance of a search warrant necessarily implies not simply that there are reasonable grounds to believe that some violation of law exists, but that there is a violation in respect to some property located on some premises or on some person, each of which can be unmistakably identified so as to be capable of being particularly described in search warrant from the information in the affidavit. *Lowrey* v. *U.S.* 161 F. 2d 30. Cert. Den. 67 S.Ct. 1737, 331 U.S. 849, 91 L. Ed. 1858.

The finding of probable cause for the issuance of a search warrant is not for the affiant or deponent seeking the issuance of same, and no search warrant should be issued unless the Judge to whom application has been made has been furnished with facts, under oath, designed to show probable cause. *Veeder* v. *U.S.* 252 F. 414, Cert. Den. 38 S.Ct. 428, 246 U.S. 675, 62 L. Ed. 933.

It must be obvious that it is an absolute impossibility to determine that persons having a wagering registration stamp are, or are not, attempting to evade the excise tax until after the monthly report is filed by such person. No matter how his business was conducted, if, at the proper time, he made a report and paid the tax due, there could have been no violation.

What has actually resulted in this case, is that the search warrants were issued without probable cause, and the violations charged in the indictment, if substantiated by the evidence seized on the search, were learned by the officers after the search.

The affidavits were the sole evidence before the Commissioner. A finding of probable cause must be based upon the affidavit and cannot be helped by what is found in the search, or by subsequent testimony introduced to bolster the affidavit. *Baysden* v. *United States,* 271 F.2d 325.

2. WAS THERE A FATAL VARIANCE BETWEEN THE INDICTMENT, CHARGING ONE CONSPIRACY, AND THE EVIDENCE, TENDING TO SHOW MULTIPLE CONSPIRACIES?

The petitioners have contended throughout that there was a fatal variance between the allegations of Count 1 of the indictment, charging one general conspiracy, and the evidence, as it was introduced. If the evidence shows a conspiracy at all to violate the laws of the United States, the conclusion is inescapable that not only did the evidence show a multiplicity of conspiracies, but it was actually the theory of the prosecuting officers of the United States. The government established that there were at least three separate and distinct numbers operations conducted by different groups at the large night club premise. The Circuit Court gave no consideration to this contention, but did find:

> "We regard this record as establishing, beyond a peradventure of doubt, at least two substantial, deliberate and interrelated schemes for large-scale federal tax evasion." (Appendix A, *infra,* 3).

With that statement, the Court then disregards consideration of the error claimed.

The evidence shows that for part of the time covered by the indictment, there was a wagering tax stamp taken by Willard Whitley and Gus Postell, a partnership, located originally on West Southgate Street, but afterwards the address changed to 339 Central. This partnership regularly filed their monthly form 730 returns, showing no wagers accepted by it, and these returns were accepted without question by the Internal Revenue Service for many months.

The variance complained of here is, of course, of no moment unless the substantial rights of the petitioners have been prejudiced. *Berger* v. *U. S.* 55 S.Ct. 629, 295 U. S. 78, 79 L. Ed. 1314. *Grissette* v. *U. S.* 313 F. 2d 187. The prejudicial effect on the rights of all of the defendants can hardly be denied. For years, according to the evidence, the Internal Revenue Service has known of the various enterprises of the petitioners and the others holding stamps on the premises but not indicted.

3. WERE THE PETITIONERS DENIED A FAIR TRIAL BY REASON OF THE FAILURE OF THE DISTRICT COURT TO SUSTAIN THEIR MOTION FOR A SEVERANCE?

The Court may order a severance of either defendants, or of counts, in an indictment or whatever other relief justice requires. Rule 14, F.R.Cr.P.

The petitioner, Gus Postell, was shown to have registered under the wagering tax act as a partner of Willard Whitley. The partnership agreement between Willard Whitley, Walter Owens and Daniel Andrews (Government's Exhibit 127, 2424a), provides:

> "That the interest of Whitley is restricted wholly and solely to the day numbers business being conducted in and upon said premises, and that he has no right, title or interest in any other business or businesses conducted in and upon the premises."

It is not shown by the evidence that the partnership of Whitley and Postell ever accepted a wager of any kind or character, but, on the contrary, they filed their regular monthly reports on form 740C showing "No Wagers Accepted".

Daniel Andrews, a defendant named in the indictment, was severed by reason of illness. This was entirely beyond the control of these petitioners. They were denied the opportunity of having him present to testify, if he so desired, which testimony would have, at least, shown the separate enterprises being conducted on the premises and the total lack of any interest of the petitioner Whitley, or responsibility for anything other than the day numbers.

The necessity for a severance is best shown by a consideration of the position of petitioner, Gus Postell, who, for eighteen days stood trial before a jury which heard repeated statements by various other defendants, not made in his presence, and not binding upon him in any sense. We submit that the oft repeated admonition of the Court that such statements were not to be considered, except as to the person making same, were insufficient to disspell the prejudicial effect from the minds of the jury. Indeed, it is just as likely that the repeated admonitions would place emphasis on the statements.

We suggest that the inference may well be drawn that this prosecution was a well planned effort on the part of the Agents of the United States to convict certain defendants. It followed a pattern of taking a number of independent acts, committed, if at all, by persons other than

these petitioners, and welded them into one indictment. The result was that during this long trial, each of the then defendants were compelled to stand trial jointly with other defendants who were charged with offenses having nothing in common, except the locale of the premises.

We further suggest that Count 33 of the indictment was included for the sole and only purpose of using it as a basis for granting immunity to witnesses under the provisions of Title 47 U.S.C. 409 L, which provides, under the administrative provisions of the Federal Communications Act, that:

> "* * * but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, he is compelled, after having claimed his privilege against self-incrimination, to testify * * *"

The Justice Department has obviously adopted the procedure of including a count in indictments, such as the one involved herein, charging a violation of the Federal Communications Act. It has done so in this case in Count 33. This means the Agents of the United States can select whomever they desire to prosecute and whomever they desire to immunize from prosecution. We urge that it borders on the ridiculous to say that these petitioners, who had no telephone service subscribed to by them, or under their control on the premise, could be guilty of causing the telephone company to violate a tariff regulation.

Mr. Donavan Derricks testified (1544a et seq.), that none of the defendants either subscribed for or were listed for any of the telephones on the premises. As to the proposition that they caused the telephone company to violate their tariff by installing these telephones, we think that is completely answered by a simple question, i.e., Why did the

telephone company install twenty telephones in various parts of one nightclub without inquiry and supervision as to their use? That is especially true in view of the fact that the various listings given by the telephone company for these telephones included a construction company, a booking agency, a roofing company and several others. The only persons in our judgment who would take this count seriously would be an attorney for the United States who used the wire and communications chapter of the Federal Statutes for the purpose of granting immunity to witnesses at a Grand Jury hearing.

This testimony could not have been introduced at a trial of these petitioners severed from other defendants for the simple reason that they had never subscribed to a telephone on the premises involved.

The prejudicial effect of the failure to grant a severance will more fully appear in subsequent questions presented in this petition.

4. SHOULD THE COURT HAVE SUSTAINED THE MOTION FOR A MISTRIAL AFTER PERMITTING THE ATTORNEY FOR THE UNITED STATES TO READ TO THE WITNESS, JAMES HARRIS, LENGTHY ANSWERS ALLEGED TO HAVE BEEN GIVEN BY HARRIS BEFORE A GRAND JURY?

The witness, James Harris, was called by the United States to testify, and after some preliminary questions, he then asserted his privilege under the Fifth Amendment on the ground of self-incrimination.

It is essential to quote, in part, what occurred (1653a to 1659a).

THE COURT: Overruled.

Q. Mr. Harris, in the course of this conversation with Mr. Andrews, was there a reference to him about the numbers business at the Copa Club?

A. Never at no time.

Q. Mr. Harris, do you recall testifying before the Grand Jury of this court?

A. That's right.

Q. Do you recall being sworn and testifying about these matters that I have questioned you about here today?

A. That's right.

Q. Do you recall stating at that time —

MR. DAVIES: We object, if the Court please.

THE COURT: Overruled.

MR. COBB: We object.

THE COURT: What are the grounds of your objection?

MR. COBB: He is giving the answers to the questions. There is no hostility.

MR. WEINTRAUB: We should be shown the minutes.

THE COURT: Approach the bench, please, gentlemen.

(Reporter's note:) the following occurred at the bench in the immediate presence of counsel and the Court, and in the presence but out of hearing of the jury:

THE COURT: I am going to permit him — this witness is on the stand and obviously according to the statements of the United States Attorney contradictory statements at a former hearing have been made, and I am going to permit them to cross-examine him, I am going to permit him to ask leading questions; I am going to permit him to treat him as a hostile witness, or as a witness that was offered by the other side. That is the law that has been established by numerous decisions of the Supreme Court of the United States, and irrespective of that it is the law in this case, and I am going to—and is going to continue to be the law in

this case as long as this case is on trial. Let's don't have to go through this every single time we offer a witness.

MR. DAVIES: It isn't a question of going through it.

THE COURT: Sir?

MR. DAVIES: It isn't so much a question of going through this, but they have had this witness and they know what his testimony is and that's exactly the point.

MR. GOLDFARB: That's exactly the point, Your Honor.

THE COURT: That is the point he has not testified to like he told them he would. That is the whole point. I am going to permit them to cross-examine him, I will permit you to do the same thing when you offer your witnesses.

MR. COBB: We don't know about his testimony.

THE COURT: Of course you don't, I don't either.

MR. WEINTRAUB: If Your Honor please, my last objection was not as to what Your Honor thinks. My last objection I was going to make was that Your Honor direct them to furnish us now a copy of the minutes of the Grand Jury.

THE COURT: I overrule your motion. That is the whole point.

MR. WEINTRAUB: Then, if Your Honor please, if they read something from him how do we know—and I am not making this charge against the Government.

THE COURT: I overrule your motion that—you didn't say anything about that, that was your objection?

MR. WEINTRAUB: I was just starting when Your Honor said come up to the bench.

THE COURT: I overrule your motion.

WHEREUPON THE COLLOQUY AT THE BENCH ENDED.

THE COURT: Wait, one of the defendants is out of the courtroom. All right, there he is, go ahead.

Q. Now, do you recall testifying on Dec. 20, 1961, before the United States District Court for the Eastern District of Kentucky, Grand Jury?

A. Yes, sir, I remember that.

Q. Do you recall being asked the question at that time: "Give us the details on that conversation." and answering, "He said the reason I have called you is because I have had so much truble with the Copa Club not making any money, I have remodeled the place, spent a lot of money, and over the years it seemed to go into the red, and it can't get out of the red, and so he said, talking to different ones and knowing you, Jim, I think you could bring it out of the red. I have a lot of money stuck in the place, I don't need the Copa Club, I got the numbers going for me, but I got this place and it has been a playground for the colored people for many years, I don't want to close the club up, I want to keep the colored trade here, so I would like for you to make money. So we discussed the thing, he said there was no numbers involved, so all I want you to do is book the shows and operate the club and so forth, so our discussion was I didn't think it was possible."

MR. DAVIES: Now, if the Court please, the defendants that I represent move the court to set aside the swearing of the jury and declare a mistrial because of the contents of the attorney of the United States in reading in full a question, with the obvious prejudicial import that this question has.

MR. GOLDFARB: This is an answer.

MR. DAVIES: Wait until I finish, Mr. Goldfarb. When the only possible things that he would have been permitted to ask under the law was some question which would contradict this statement, and a bare statement that the witness made, that there was no mention made of numbers. Now that — there was only two or three words answer, and Mr. Goldfarb has

read a highly prejudicial question—prejudicial to every one of these defendants.

MR. WEINTRAUB: The defendants that I represent join in that motion, Your Honor.

THE COURT: Overruled.

Q. Do you remember making that answer to the question I read to you?

A. Well, you have asked me a lot, you read quite a bit there.

Q. Well, do you want me to go over it slowly and you can answer each sentence—each question?

Do you remember saying first—and this is in reference to your conversation with Mr. Andrews—

THE COURT: Let him take the record—do you have it there?

MR. GOLDFARB: Yes, sir.

THE COURT: Let him look at it and read it and see whether or not he made those statements.

Q. Showing you—

MR. WEINTRAUB: If Your Honor please, may I request the Court to make a motion that the defense be furnished—I don't know whether they have got it in the record when we were there before, that the defense be furnished with a copy of the minutes of the testimony of Mr. Harris before the Grand Jury because, for several reasons, first, it is impossible for the defense to know—I make no charge or accusation against the government.

THE COURT: Now approach the bench here a minute.

(Reporter's note: The following occurred at the bench.)

in the immediate presence of counsel and the Court, and in the presence but out of hearing of the jury:

THE COURT: Now what is the basis of your motion. What right have I got to require the United States to produce its records?

MR. WEINTRAUB: Well, if Your Honor please, for the simple reason how do we know—

THE COURT: Wait a minute. Don't argue the point you are making a speech before the jury and doing the same thing you are accusing the United States attorney of doing, making it appear that the United States is trying to conceal something from you. There is no law that I know of that permits the court to require them to do it. What is it?

MR. WEINTRAUB: Then, if Your Honor please, I would just like to say this, maybe it is a matter that law would have to be established, but I want to give you my reason. My reason is, number one, we have no reason if government counsel is misreading a question and answer. We have no way of knowing whether it is being taken out of context.

and continuing on page 1662a of the Appendix:

Q. Now, Mr. Harris, do you remember my last question to you. Do you want me to repeat it to you?

A. You can repeat it.

Q. Do you recall testifying before the Grand Jury on the date I have stated, and answering to this question "Give us the details of that conversation," the following answer: "He said the reason I have called you is because I have had so much trouble with the Copa Club, not making any money. I have remodeled the place, spent a lot of money and over the years it seemed to go into the red, and I can't get it out of the red, and so he said, talking to different ones and knowing, you, Jim, I think you could bring it out of the red. I have a lot of money stuck in the place, I don't need the Copa Club. I got the numbers going for me, but I got this place and it has been a playground for colored people for many years; I don't want to close the club up, I want to keep the colored trade here, so I would like for you to make money. So we discussed the thing, he said there was no numbers involved, all I want you to do is book the shows and operate the club and so forth, and so our discussion was I didn't think it was possible."

Do you remember being asked that question and making that answer?

A. I would like to refuse to answer that question on the grounds that I might be incriminated.

* * *

Q. Do you remember testifying before the grand jury being asked this question — "This was Frank Andrews saying this?" — Answer: "Yes, they came to me and said, why don't you get back in the bottoms where you belong, you've got that colored trade and no one is bothering you, why do you want to come up here in this end, and he also told me, he said, if I would go back to the bottoms they would put together this numbers racket and consolidate it into one racket there was one or two bucking one another, and I said I didn't think it was possible to do it, so he said, I can't do it, and that was the end of it."

MR. DAVIES: We object.

MR. GOLDFARB: Your Honor every question I asked this witness has been based on these questions.

THE COURT: Overrule the objection.

Q. Do you remember being asked that question and making that answer?

A. I refuse to answer that question on the grounds that I might incriminate myself.

MR. DAVIES: Now, if the Court please, I want to renew my motion to set aside the swearing of the jury and declare a mistrial because of the reading of those questions.

THE COURT: Overruled.

MR. COBB: We join in the motion.

MR. WEINTRAUB: We join in the motion.

THE COURT: Overruled.

Members of the jury, you will not consider these questions as I have instructed you, you will not consider these questions as having any bearing upon the guilt or innocence of these accused; or any of them, they are asked solely here for the purpose of

examining this witness, who the court says may be examined under the rules of evidence if he were a hostile witness.

Q. Mr. Harris, I will ask you if you recall being asked the question before the same Grand Jury at the same date: "Did he discuss with you anyone else taking over the Copa Club?" And making this answer: "Yes, I said, yes, I know a man I was just with last week that just lost this job, that is good on booking shows, he has been in the business for years around night clubs, has had many night clubs of his own, which I belive might fit the picture for you, I think I can get him down and I think he can do the job for you. So he asked me who it was and I told him Al Holtzman out of Chicago, so I called Mr. Holtzman and he talked to Mr. Andrews and it was only a matter of a few days until Mr. Holtzman was working, running the club for Mr. Andrews." Do you recall being asked that question and making that answer?

MR. COBB: Objection.

THE COURT: Objection sustained. I don't think that is pertinent, and —

MR. DAVIES: I renew my motion to declare a mistrial, Your Honor.

THE COURT: Overruled.

MR. WEINTRAUB: The defendant Walter Owens and other defendants join in the motion.

THE COURT: Overruled.

MR. COBB: We join in the motion.

* * *

The trial court did, at the request of counsel for the defendants, instruct the jury concerning the evidence, but we feel that did not cure the obvious disastrous results of the questions asked.

What was done by the government attorney in this instance is a matter that goes to the core and heart of the right of a defendant to a fair trial. What was done

was violative of the *Confrontation Clause of the Sixth Amendment*. Not only was it violative as to the rights of Frank J. Andrews; it was in every respect even more vicious and destructive in its effect and application to the other defendants — regardless of the court's admonition to the jury.

Admittedly, the questions asked of Harris were not in the nature of substantive evidence; but the mere asking of the questions had the same effect, notwithstanding the court's instruction not to treat it as such. No admonition, however strong, could wipe out of the jury's mind the effect of these questions. It was well calculated to impress the jury. It did!

The prejudicial effect of similar testimony was recognized in *Douglas* v. *Alabama*, 380 U.S. 415; 13 L.Ed.2d 934, 85 S.Ct. 1074.

In this case, the damage was greater than in the *Douglas* case. In *Douglas* the prosecution at least had the "confession" identified. In this case, counsel for the defendant pleaded with the court to allow counsel to examine the Grand Jury minutes, from which the Government attorney claimed he was reading. (1655a-1661a). While this would not have cured the violation of the constitutional rights of the defendants, it would have at least allowed the defendants, through their counsel, to ascertain whether the questions and answers being read were being properly read, or whether they were being read out of context. The request of the defendants was denied by the trial court.

This issue was not discussed in the opinion of the Court of Appeals, although it was an issue of vital importance. It was an error of substance, so violative of the rights of the petitioners that on this one issue alone the lower courts should have been reversed and a new trial granted.

5. DID THE COURT ERR IN OVERRULING THE MOTION OF THE PETITIONERS, POSTELL AND WHITLEY, FOR A JUDGMENT OF ACQUITTAL?

The petitioner Whitley was an active partner in the "day numbers" operation, with no interest in any of the other operations on the premises. The computation of tax alleged to have been evaded was based very substantially on "night numbers" and other wagering activities. The petitioner, Whitley, monthly prepared a report which was delivered by other partners to the tax accountant for the partnership, and those reports were converted to the monthly return, Form 740C, by the accountant. There is no showing that Whitley ever knew or had information from which an intent to defeat the payment of the wagering tax could be inferred. He was shown by the partnership agreement, supra, to have a 50% interest in the "day numbers" only, and this interest was of the gross receipts of the day numbers, without any expenses (1386a), which, we take it, would include the payment of taxes.

The petitioner, Gus Postell, admittedly applied for, and received, a wagering tax registration stamp as a partner with Willard Whitley, under the partnership name "Whitley & Postell". That partnership, sofar as this record is concerned, never operated. From the time of its inception, the partnership was never shown to have accepted wagers. Gus Postell was never shown to have accepted a wager, even as an agent of any of the other partnerships. Postell was actually on salary at the night club as manager of the bar (1388a). Every month, Form 740C, filed by this partnership, showed "No Wagers Accepted". These monthly returns were never questioned by the Internal Revenue Service, and were accepted by them.

He was not shown to have any interest in any of the operations at the club, except as bar manager. The theory of the government was that he was on the premises on occasion, and on rare occasions, he assisted one of the lady clerks to "look for hits". This activity did not take place until after the lottery was over, and was purely clerical in character.

It is obvious that the conviction of the petitioner Postell is based upon the fact that he possessed a wagering stamp. It is likewise obvious that the jury considered this as an admission by him of some interest in the partnership operating the lottery. This is borne out by the verdict which found this petitioner "Not Guilty" on the substantive count for each month, except those during which he was registered as a partner of Whitley. The conclusion is inescapable that his conviction was based on this inference.

An inference based upon the mere registration and application for an occupational wagering tax stamp clearly violates the *Fifth Amendment to the Constitution of the United States* as compelling petitioner to give evidence against himself. The possession of the occupational stamp cannot be considered as a confession or admission of a past violation of the law. *United States* v. *Kahriger,* 345 U.S. 22, 92 L.Ed. 754, 73 S.Ct. 510.

The effect to be given the possession of the stamp was discussed by the Supreme Court of the State of Florida on several occasions. While not binding upon this Court, the opinions of the Supreme Court of Florida are persuasive by reason of their sound reasoning.

The State of Florida enacted a statute providing in substance that the possession of the Federal Gambling Stamp would be prima facie evidence in prosecutions under

Florida gambling laws. The Supreme Court of Florida declared the Statute unconstitutional and ordered the discharge of one Jefferson, who had been held for Grand Jury action by a committing Magistrate. The case discusses many of the facets presented by this petition, and, we think, will be logically persuasive of our position.

Jefferson v. *Sweat,* 76 So. 2d 394.

In another case, the Florida Supreme Court held that no presumption could be raised by reason of holding a Federal Gambling Stamp in an action to abate a nuisance. The Court went even further and expressed the belief that "to treat payment of the 10% Federal tax on gambling receipts as a confession, would be to render the Statute unconstitutional."

Boynton v. *State,* 75 So. 2d 211.
See also, *McNabb* v. *United States,* 318 U.S. 332; 63 S. Ct. 608; 87 L. Ed. 818, and *Rowe* v. *Florida,* 84 So. 2d 409.

We submit that the decisions of this Court in *Ingram* v. *United States,* 360 U.S. 672, 3 L. Ed. 2d 1503, 17 S. Ct. 1314, and *United States* v. *Calamaro,* 354 U.S. 351, 1 L. Ed. 2d 1394, 77 S. Ct. 1138, are controlling here. The government has completely failed to establish that the petitioner Postell had any interest, duty, knowledge or intent with respect to the offenses charged in the indictment herein, which are all necessary under *Ingram* and *Calamaro, supra.*

CONCLUSION

For the reasons stated, we think it clear that the Writ of Certiorari to the Sixth Circuit Court of Appeals should be granted. These reasons are:

The combination of several offenses into one indictment;

The admission of evidence as to a number of conspiracies, with but one general conspiracy alleged;

The repeated admission of statements made by defendants, other than these petitioners, were highly prejudicial to them, notwithstanding the frequent admonitions of the Court;

The permission by the trial court to the attorneys for the government to read Grand Jury testimony of the witness James Harris, after the witness had claimed a Fifth Amendment privilege;

The failure of the Court to sustain the several motions for a mistrial made at that time;

The conviction of the petitioner, Gus Postell, based upon his having registered as a partner with Willard Whitley;

The failure of the Sixth Circuit Court of Appeals to consider and pass upon many of the errors assigned upon the appeal to that court;

The impossibility of avoiding the prejudicial effect upon these petitioners of the highly prejudicial news and newspaper accounts; and the coercive effect of the instructions of the Court to the jury, both of which are fully discussed in the petition and brief of Frank J. Andrews, filed herein;

all of which are conducive to the belief that this proceeding and the verdict of guilty against these petitioners, violate the right of due process under the Fifth Amendment, and the right to a trial by an impartial jury, under the

Sixth Amendment to the Constitution of the United States.

Respectfully submitted,

.....

DANIEL W. DAVIES

.....

THOS. D. HIRSCHFELD

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Attorneys for Petitioners,
Gus Postell and Willard Whitley.

APPENDIX A.

Opinion Below.

No. 15623

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* FRANK J. ANDREWS, WALTER OWENS, PETER A. ANDREWS, JR., WILLARD WHITLEY, GUS POSTELL, LOUIS TYE, FRANK D. ANDRIOLA, RUSSELL A. MALONE, *Defendants-Appellants.*	APPEALS from the United States District Court for the Eastern District of Kentucky at Covington.

Decided June 17, 1965.

Before: MILLER, CECIL and EDWARDS, Circuit Judges.

EDWARDS, *Circuit Judge.* These appeals are from convictions for conspiracy to violate, and specific violations of the Internal Revenue Statutes by fraudulently concealing and witholding gambling excise taxes.

The first count of the indictments was a conspiracy count and the balance of the counts, 2 through 32, consist of the substantive counts of willful understatement of or failure to pay the excise taxes. Count 33 charged violation of the Federal Communications Act, and Counts 34 and 35 charged willful failure to register and pay the wagering occupational tax.

Defendant Frank J. Andrews was found guilty on Count 1 and received a sentence of five years and $10,000 fine. Defendant Daniel Andrews was severed because of his illness. The other seven defendants were found guilty on Count 1 and on a variety of the substantive counts. They were sentenced to terms of five years on each count for which they were convicted, except that Peter A. Andrews and Russell A. Malone were sentenced to only one year for their convictions on Counts 34 and 35. All seven were also fined $10,000 for conviction on Count 1. All of the sentences were made to run concurrently.

This trial was a sequel to large-scale,[1] illegal but wide open gambling operations in Newport, Kentucky. This record clearly establishes the nature and extent of the gambling. Indeed, no defendant, other than Frank Andrews, takes the trouble to deny being in the "business" of gambling during the time concerned. All do deny conspiring to evade federal wagering taxes and the substantive offenses charged.

Each of the several briefs filed on behalf of defendants argues the insufficiency of the evidence to support the verdicts and in this regard relies upon the applicable law as set forth in *Ingram* v. *United States,* 360 U. S. 672 (1959). In that case the United States Supreme Court affirmed convictions as to defendants Ingram and Jenkins (described as "entrepreneurs") and reversed as to defendants Smith and Law (described as "relatively minor clerical functionaries").

The Court's distinctions as set forth in the majority opinion of Mr. Justice Stewart thus:

---

[1] Computations of government evidence indicate total wagers during the times concerned of over five million dollars and a total tax evasion of over four hundred thousand dollars.

"But the evidence of agreement between Ingram and Jenkins to operate this gambling enterprise, which operation made them liable for federal taxes, and to conceal its operation and its income is clear on this record, and is virtually conceded by the petitioners. The evidence was sufficient to support a conclusion that they were engaged not only in a conspiracy to operate and conceal their gambling enterprise, but that they were also parties to an agreement to attempt to defeat or evade the federal taxes imposed upon the operators of such a business.

"As to Smith and Law, the case is quite a different one. While the record clearly supports a finding that Smith and Law were participants in a conspiracy to operate a lottery and to conceal that operation from local law enforcement agencies, we find no warrant for a finding that they were, like Ingram and Jenkins, parties to a conspiracy with a purpose illegal under federal law. Certainly there is nothing in the record to show that Smith and Law knew that Ingram and Jenkins had not paid the taxes, a fact obviously within the knowledge of the latter. . . ." *Ingram* v. *United States, supra* at 677.

Thus, we take it, convictions for conspiracy to evade federal gambling tax laws cannot be sustained absent proof 1) that defendants were parties to an agreement to defeat or evade the taxes, or 2) that defendants had knowledge that the taxes were due and were not being paid, plus conduct in furtherance of a plan to evade them.

We regard this record as establishing beyond all peradventure of a doubt at least two substantial, deliberate and interrelated schemes for large-scale federal tax evasion. The first such scheme relates to a method for reporting approximately one-quarter of the taxes actually due on the "day" numbers game and other related gambling activities. As testified to by Ruth Jane Siuda, one of the six girls who

"ran the work" on the "day" numbers, it was her job after the totalling of the work and after the hits had been determined to "pull the work." Her testimony leaves no doubt that this meant extracting the most convenient one-quarter of the bet slips so as to show a total take of $1,500-$2,000 per day, whereas in fact the daily total on this operation was $8,500. (See Appendix A.) The federal tax returns show clearly that taxes were paid only on the work thus "pulled."

The second major scheme for tax evasion involved the operation of a "night" numbers game. The record clearly establishes that no taxes were paid on this game at all, and it is argued to us that we should read the record as establishing that this game was within the exception to the wagering tax statute. Int. Rev. Code of 1954, § 4421(2)A.

The evidence, however, is overwhelmingly to the contrary, as obviously the jury found. It is patent that many of the persons participating in the "night" numbers operation were not on the premises at the time of the declaration of the winners and that the fact situation here involved large-scale telephone bet procedures, as well as the writing of bets off the premises.

As to Walter Owens, Willard Whitley, Peter Andrews, Jr., and Gus Postell, there can be no doubt about their status as entrepreneurs in relation to one or the other of the two major tax evasion schemes which we have referred to above. The records of the gambling partnerships, the tax return forms, and the testimony of Internal Revenue Supervisor William R. Tabb, and Agent Robert L. Thomas is ample to establish this.

We believe that the testimony of the Revenue Agents, plus Government Exhibit 305 (See Appendix B) is sufficient evidence from which the jury could have found Louis Tye and Frank ("Bud") Andriola guilty on the conspiracy

count as entrepreneurs likewise. Furthermore, their was testimony by a government handwriting expert that Exhibit 305 was in the handwriting of defendant Frank J. Andrews. (See Appendix C.)

As to Russell A. Malone, the testimony clearly indicates his role in advertising that no taxes were paid on the "night" numbers game, while at the same time assuring bettors that they did not in fact have to be present to win. Hence, his conviction on the conspiracy count seems warranted by the evidence herein. We regard it as consistent with the second of the two evidentiary standards set forth by Justice Stewart in the *Ingram* case.

As to Defendant Frank J. Andrews, the evidentiary situation relating to Count 1 is quite different. He was admittedly owner of "The Sportsman's Club" wherein these wide open gambling operations were conducted. It is his contention that his relationship to the club was entirely that of owner of the building and the landlord of those defendants who rented the premises. There is, however, strong circumstantial evidence that defendant Frank J. Andrews was more than a landlord. The unconcealed nature of the gambling operations conducted at his Sportsman's Club, his presence on the first day of the "consolidated operation" of the numbers business, his ordering the installation of the burglar alarm system at the new Sportsman's Club, his visits to the bookkeeping room where the girls "ran the work," the testimony which indicates that it was he who dealt with the competitive threat of Junior Andrews' location, the fact that he hired one of the telephone operators for the "night" numbers game, and the fact that substantial sums were paid out of the "day" numbers proceeds for taxes or rental owed by defendant Frank J. Andrews personally all represent facts from which this jury could have inferred that defendant Frank Andrews

had an entrepreneurial relationship to the gambling operation at the Sportsman's Club and knowledge of the two schemes for tax evasion which we have previously described.

Perhaps the most significant bit of evidence pertaining to Frank Andrews' knowledge and participation in the "day" numbers tax evasion scheme is the testimony which clearly establishes that Frank Andrews paid for construction of a hidden closet at the Sportsman's Club. This closet, controlled by an electrical attachment which "could be opened by touching two nails," was discovered at the time of the August 1961 raid. It contained the "pulled" and "bundled" work for July 1961. Testimony indicated that such "bundles" amounted to less than one-fourth of the total wagers. But the total of the "bundled" work found in the secret closet corresponded exactly with the amount of wagers reported for tax purposes for the month of July 1961.

In addition, testimony showed deposits of $103,000 in defendant Frank Andrews' bank account between October of 1960 and August of 1961. Many of these deposits to Andrews' account were made by an agent of the "day" numbers gambling partnership and over 100 of the checks deposited had symbols on them which were identified as the symbols of various numbers writers.

In short, we believe that the evidence of a substantial conspiracy to evade and defeat the payment of federal wagering taxes was overwhelming and that there was ample evidence to support the jury findings of guilty as to the conspiracy count of the indictment as to all of the defendants in this case within the rule of *Ingram* v. *United States, supra.*

As to the substantive counts, we do not contemplate such detail. Again, the proofs of willful evasion of taxes

offered by the government to support the various counts was overwhelming and uncontroverted.

The meticulous care with which the jury dealt with the individual indictments in this trial is demonstrated by the highly specific verdicts which were returned:

> "We the jury find the defendants as named.
>
> "Frank J. Andrews Guilty on Count 1—undecided on counts 2 thru 33.
>
> "Walter Owens guilty on counts 1 thru 33.
>
> "Peter A. Andrews, Jr., guilty on counts 1 thru 29 and 33-34-35.
>
> "Willard Whitley guilty on counts 1 thru 33.
>
> "Gus Postell guilty on counts 1 thru 15 and 33. Not guilty on 16 thru 32.
>
> "Louis Tye guilty on counts 1 thru 33.
>
> "Frank Andriola guilty on counts 1 thru 9 and 33.
>
> "Russell Malone guilty on counts 1 and 34, 35.
>
> "MELVIN HART, Foreman."

We have read the record and believe that there is ample proof to support the verdicts just recited.

The other important issue argued in this case pertains to the complaint, particularly by defendant Frank Andrews that pretrial and during trial publicity deprived him of due process of law and a fair and impartial jury trial.

This court has dealt recently and extensively with due process violation claims asserted to have been caused by press media prior to and during a criminal trial. *Sheppard* v. *Maxwell*, — F. 2d — (C.A. 6, 1965). Decided May 5, 1965.

It is certain that defendant's claim as to publicity do not begin to approach in quantity or possible prejudicial impact those asserted and rejected by the majority opinion in *Sheppard*.

As to the standards set in the dissenting opinion, the distinctions between the publicity impact upon this trial as compared to the Sheppard trial are numerous and important.

This was not a capital case.

There is no indication of public shock in this community over the crime of federal tax evasion being charged. This community had indeed been quite tolerant of defendant's "business."

It should particularly be noted in this regard that defendants never moved for a change of venue.

The trial judge was not a candidate for an immediately forthcoming judicial election; and certainly no one could say from this record that the press was ever allowed to become "the dominant factor" in Judge Swinford's courtroom.

The admonitions to the jury not to read the newspapers or listen to radio or TV were in unmistakable language and repeated at every adjournment. See *Coppedge* v. *United States,* 272 F. 2d 504 (C. A. D. C., 1959); *Estes* v. *United States,* 335 F. 2d 609 (C. A. 5, 1964), *cert. denied,* 379 U. S. 964 (1965).

The press comment on the trial, although frequently played on page one, was generally concerned with reporting what went into the trial record. The variances which were called to our attention do not in our judgment represent the "deliberate and highly prejudicial supplementation of the trial record" which was referred to in the dissenting opinion in Sheppard. See *Sheppard* v. *Maxwell, supra at —.*

This record does not disclose extrajudicial contacts with and communications to this jury.

Finally, we have every reason to believe that the jury

verdict in this trial was a "verdict . . . based upon the evidence developed at the trial." *Turner* v. *Louisiana,* 379 U. S. 466, 472 (1965).

While appellants rely upon *Briggs* v. *United States,* 221 F. 2d 636 (C. A. 6, 1955); *Marson* v. *United States,* 203 F. 2d 904 (C. A. 6, 1963), and *Stone* v. *United States,* 113 F. 2d 70 (C. A. 6, 1940), we find the factual distinctions between this case and those relied on to be both significant and determinative. The facts in this case pertaining to claimed prejudicial publicity are directly comparable to those in *Estes* v. *United States, supra.*

We also believe that the trial judge committed no error in denying the motion to suppress the evidence seized in this case. Rule 41 of the Federal Rules of Criminal Procedure recites in part:

> "The warrant shall be directed to a civil officer of these United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. . . ." Rule 41(c) Fed. R. Crim. P.

We have no doubt that the Internal Revenue Agents who served these warrants were properly designated under the terms of this rule. *United States* v. *Sigal,* 341 F. 2d 837 (C. A. 3, 1965); *United States* v. *Pasha,* 332 F. 2d 193 (C. A. 7, 1964), *Cert. denied,* — U. S. — (1965).

Further, we find no prejudicial error in Judge Swinford's charge when its language is taken as a whole and construed in context.

In this otherwise appropriate charge, however, the trial judge used two sentences which concern us. Referring to reasonable doubt he said: "It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror." We do not

believe that this language is desirable. While it may be argued that this simply tells the jury that it is not any captious doubt which should cause them to withold a verdict if otherwise convinced, it seems to us to place the Court in the position of urging a verdict with more emphasis than is appropriate.

These words also, however, must be viewed in relation to the totality of the Judge's charge on reasonable doubt. (See Appendix D.) Taken as a whole we believe that defendants suffered no prejudice therefrom.

In this regard and in relation to the numerous other issues presented by appellants which we have reviewed, we find no reversible error. Rule 52(a) Fed. R. Crim. P.; 28 U. S. C. § 2111.

Affirmed.

APPENDIX A.

(Testimony of plaintiff-appellee's witness Ruth Jane Siuda)

"Q. (By Mr. Lynch) How did that bundle come to be made?

"A. After we ran the work, the overlooks were pulled out of it, this, then I bundled the work.

"Q. Now, by 'bundled the work' what do you mean that you would do?

"A. Pull these books out of it and put a rubberband around it.

"Q. You would pull the books out?

"A. Yes.

"Q. By that you mean you would pull certain work out?

"A. Yes.

"Q. And how would the work ordinarily be placed, the work from which you would pull these books?

"A. It was all in boxes.

"Q. How many boxes for a day's work?

"A. Three.

"Q. Now, after you—observing the, this particular bundle dated 7/28/61, did you make the tape on that?

"A. Yes, I did.

"Q. How would you know which bundles to pull?

"A. Well, it was usually the same work all the time.

"Q. Well, would you have a particular figure or amount that you would pull?

"A. From 18 to $2,000.

"Q. And in addition to this work that you would pull in, the $18,000 to $2,000 that is a high figure, is that right? In other words, you would pull out a bundle that 18 would equal an $18 to $2,000 high?

"A. Yes.

"Q. What would be done with the other work?

"A. We would keep it three days and then put it in a box.

"Q. And what would happen to it after you put it in a box?

"A. I don't know what happened to it.

"Q. Well, what would you do with it?

"A. I wouldn't do anything with it, just put the work in the box.

"Q. Would you put the box in a particular place?

"A. Just left it in the office.

"Q. And when you came there the next morning would the box be there?

"A. No.

"Q. And the work that you put in this box after three days, the work that hadn't been pulled and bundled, were those the yellow bet slips?

"A. Yes.

"Q. Were those white sheets of paper the telephone work?

"A. Yes.

"Q. Now, do you know what proportion of the work that you would pull and bundle, what proportion that represented to the entire work for that particular day?

"A. Each day ran differently but I would say about a quarter of it.

* * *

"Q. Well, after you did this bundling operation from the previous day's work, how much work would remain after that?

"A. Oh, three-fourths of it.

"Q. And how many boxes similar to boxes such as are shown in government exhibit 199, would the remaining unbundled work fill?

"A. I don't know that it filled it but there would be two boxes.

* * *

"Q. Now, who would be the people who would go through the work and look for the hits?

"A. Who?

"Q. Who?

"A. All of us did it.

"Q. All of who?

"A. All the girls in the office.

"Q. Anyone else?

"A. We had about three girls, four girls come in.

"Q. Anyone else?

"A. Mr. Whitley, sometime.

"Q. Anyone else?

"A. Mr. Postell, sometimes.

"Q. Anyone else?

"A. No.

"Q. Now, after you went through and got the hits for each of the books, you would pull the tickets, mark them, somebody would compute the amounts of hits, is that correct?

"A. That's right.

* * *

"The Court: What was the total amount of money taken in by the house on the day numbers?

* * *

"The Court: Well, I mean from the time charged in this indictment, I don't think that is too material, but we will put it that way.

"Mr. Lynch: From the time she was in the Old Sportsman's Club Your Honor, that would cover it.

"The Court: From the time you were in the Old Sportsman's Club. Can you give me that? If you can't just say you can't.

"The Witness: I would say roughly about, roughly about $8500.00.

"The Court: Roughly $8500.00?

"The Witness: (Nods)."

APPENDIX B

(Testimony of Sidney William Macauley, Special Agent, Intelligence Division, Internal Revenue Service.)

"Q. (By Mr. Lynch) Now, turning to page 47 of this ledger, can you tell us what the figures are and will you demonstrate it on this machine and where the figures are obtained from?

* * *

"A. (Continuing) This page 47 in the journal is dated July 2nd. The expense column—your income column. This is the expense column. This is the difference. Now, let's

look at these figures here. Remember I went back a few pages, I went back five pages and the figure was $885 and some cents. The next page, the difference between expenses and income was $409 and then I read aloud the postings from the other pages, $1269, $1222, and this figure $2415.68 is shown here as $2415. If you were to add these five weeks figures, you would arrive at $6300. If you take 50% of it, divide it in half, half of $6300 is $3150. There is a small word here, which I don't know if you can read it, but it says 'house.' We have '10% Bud,' 10% of $3150 is $315, shown here. You subtract $3150 and $315 from $6300, you arrive at $2835, and it is marked over here, 'Junior and Louis.'

"If you divide the remainder, 2835, in half, you get $1417.50, Louis; $1417.50, Junior. . . ."

GOVERNMENT EXHIBIT No. 305

				47
		July 2		2415.68
Jr. and Tye	300.00	Bar		1784.15
Band	700.00	Craps		1005.00
Buddy	75.00	Ex Craps		490.00
Duck	30.00	Door		481.50
Andrews	41.00	Booker		33.75
Perry	21.00	Beat Dealers		33.20
Tom	50.00	Nigh Roll		968.00
Pitt	50.00			———
Ex Porter	25.00			4795.60
Lot man	20.00			
C. Johnson	25.00			
Worthy	15.00	2415.00		
D. Henny	130.00	1222.00		
RLD	54.00	1269.00		
Whisky	344.77	509.00		
Bar	307.25	885.00		
Coca Cola	26.40	———		
W. T. Wagner	9.10	6300.00		
New Way	31.51	3150.00	House	
10% Tax	109.49	315.00	10% Bud	
Fruit Products	15.40	2835.00	Jr. Lewis	
	———	1417.50	Lewis	
	2379.92	1417.50	Jr.	

APPENDIX C.

(Testimony of plaintiff-appellee's witness Edwin C. Schroeder)

"Q. (By Mr. Lynch) Showing you Government Exhibit 305, which is a ledger, referring you to page 47, of that ledger, and specifically to that portion of the page which has a series of figures on the righthand side with notations, '315 house, 315 10% Bud, Junior, Louis, Louis and Junior,' have you seen and made an examination of that?

"A. Yes.

"Q. Now, have you arrived at an opinion as to whether Government Exhibit 314, the slip with the 'Frank J. Andrews, O.K.', Government Exhibit 210-A the spiral notebook, the first page of the spiral notebook; and Government Exhibit 305, page 47 and the listings, the figures, the notations thereon, were written by the same person who wrote the signature cards which are Government Exhibit 237, signed by Frank J. Andrews, the American District Telegraph contract, which is Government Exhibit 299, and the checks, forming Government Exhibit 301?

"A. I have an opinion.

"Q. What is that opinion?

"A. It is my opinion that the writer of the various standard documents signed Frank J. Andrews is the author of the notations in the ledger, the lower right half, and the small slip of paper and the notations in the spiral notebook."

APPENDIX D.

"In the first place, these defendants, and each of them, are presumed to be innocent until their guilt is established to your satisfaction to the exclusion of a reasonable doubt. That presumption of innocence starts with them at the beginning of the case and remains with them throughout the trial, and must be overcome by evidence, before you can accept as evidence as establishing their guilt. You must start with the presumption that these defendants, and each of them, are innocent until their guilt is established to your satisfaction, as I say, to the exclusion of a reasonable doubt.

"The term reasonable doubt, as used in this instruction, is best defined by a use of the term itself. Don't be confused by reasonable doubt. It is not an excuse not to make a verdict. It is not a shield to hide behind to keep from carrying out your responsibility as a juror. It is very easy for a person in his own mind to say, "Well, true, I have a reasonable doubt." Well, that is a rather variable thing, what is reasonable and what is unreasonable. But I think as common sense men of everyday affairs, you do understand the difference between what is reasonable and what is unreasonable, and so this term reasonable doubt means just what it says. It is a doubt based upon reason, not some inconsequential doubt that might flit through the mind of a juror, not some slight mental hesitation that might guide you in determining the less significant affairs of everyday life; but a doubt for which there is reason, such a doubt as would guide you in determining the course of action in the conduct of your ordinary everyday living; a

doubt based upon reason, not some shadowy, inconsequential misgiving.

"Few things are capable of proof to absolute certainty and while it is required of the law that the United States should establish its case to the exclusion of a reasonable doubt, it does not mean that the United States should prove its case beyond all doubt. And if it were so required, it would be practically impossible for the United States to successfully carry out the prosecution of the laws. So that term reasonable doubt is used in the sense which I have undertaken here to define it to you.

"Now, your verdict must be unanimous. You are not to arrive at a verdict by casting lots, by holding a primary election, by drawing straws, but your verdict must be unanimous. It must be the verdict of each juror. Each juror must make up his mind what the verdict should be. . . ."

APPENDIX B

Judgment.

(Filed June 17, 1965)

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK J. ANDREWS, et al.,
Defendants-Appellants.

JUDGMENT.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

CARL W. REUSS,
Clerk.

APPENDIX C

Order Denying Petition for Rehearing.

(Filed August 30, 1965)

UNITED STATES COURT OF APPEALS
For the Sixth Circuit.

No. 15,623.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK J. ANDREWS, et al.,
Defendants-Appellants.

ORDER.

Before: MILLER, CECIL and EDWARDS, *Circuit Judges.*

Petitions for rehearing having been received and considered by the court in the above-styled appeal,

IT IS HEREBY ORDERED that said petitions be DENIED.

Entered by order of the court:

/s/ CARL W. REUSS,
Clerk.